U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

(b)(6)

U.S. Citizenship and Immigration Services

[redacted]

DATE: FEB 20 2013 OFFICE: TEXAS SERVICE CENTER [redacted]

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of $630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the employment-based immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner seeks classification under section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as an alien of exceptional ability and as a member of the professions holding an advanced degree. The petitioner seeks employment as a middle school mathematics teacher for [redacted] The petitioner asserts that an exemption from the requirement of a job offer, and thus of a labor certification, is in the national interest of the United States. The director found that the petitioner qualifies for classification as a member of the professions holding an advanced degree, but that the petitioner has not established that an exemption from the requirement of a job offer would be in the national interest of the United States.

On appeal, the petitioner submits a brief from counsel as well as background documentation.

Section 203(b) of the Act states, in pertinent part:

> (2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. –
>
> > (A) In General. – Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.
> >
> > (B) Waiver of Job Offer –
> >
> > > (i) . . . the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

The petitioner claims eligibility for classification as an alien of exceptional ability in the sciences, the arts or business. The record establishes that the petitioner, whose occupation qualifies as a profession and whose post-baccalaureate experience is equivalent to a master's degree under the U.S. Citizenship and Immigration Services (USCIS) regulation at 8 C.F.R. § 204.5(m)(3)(i)(B), qualifies as a member of the professions holding the defined equivalent of an advanced degree. An additional determination regarding the petitioner's claim of exceptional ability would serve no practical purpose.

Neither the statute nor the pertinent regulations define the term "national interest." Additionally, Congress did not provide a specific definition of "in the national interest." The Committee on the

Judiciary merely noted in its report to the Senate that the committee had "focused on national interest by increasing the number and proportion of visas for immigrants who would benefit the United States economically and otherwise. . . ." S. Rep. No. 55, 101st Cong., 1st Sess., 11 (1989).

Supplementary information to regulations implementing the Immigration Act of 1990, published at 56 Fed. Reg. 60897, 60900 (November 29, 1991), states:

> The Service [now USCIS] believes it appropriate to leave the application of this test as flexible as possible, although clearly an alien seeking to meet the [national interest] standard must make a showing significantly above that necessary to prove the "prospective national benefit" [required of aliens seeking to qualify as "exceptional."] The burden will rest with the alien to establish that exemption from, or waiver of, the job offer will be in the national interest. Each case is to be judged on its own merits.

In re New York State Dept. of Transportation (*NYSDOT*), 22 I&N Dec. 215 (Act. Assoc. Comm'r 1998), has set forth several factors which must be considered when evaluating a request for a national interest waiver. First, the petitioner must show that the alien seeks employment in an area of substantial intrinsic merit. Next, the petitioner must show that the proposed benefit will be national in scope. Finally, the petitioner must establish that the alien will serve the national interest to a substantially greater degree than would an available United States worker having the same minimum qualifications.

While the national interest waiver hinges on prospective national benefit, the petitioner must establish that the alien's past record justifies projections of future benefit to the national interest. The petitioner's subjective assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. The intention behind the term "prospective" is to require future contributions by the alien, rather than to facilitate the entry of an alien with no demonstrable prior achievements, and whose benefit to the national interest would thus be entirely speculative.

The AAO also notes that the USCIS regulation at 8 C.F.R. § 204.5(k)(2) defines "exceptional ability" as "a degree of expertise significantly above that ordinarily encountered" in a given area of endeavor. By statute, aliens of exceptional ability are generally subject to the job offer/labor certification requirement; they are not exempt by virtue of their exceptional ability. Therefore, whether a given alien seeks classification as an alien of exceptional ability, or as a member of the professions holding an advanced degree, that alien cannot qualify for a waiver just by demonstrating a degree of expertise significantly above that ordinarily encountered in his or her field of expertise.

The petitioner filed the Form I-140 petition on January 13, 2012. In an accompanying statement, counsel stated:

> Considering [the petitioner's] more than three (3) years of teaching **Mathematics to Middle School students** in [redacted] she has in her own little but noble way been contributing to the national interest of helping improve the **Mathematics Education** in the United States of America. . . .

> In addition, [the petitioner] is one of the few public school teachers who specialize in [the] Montessori education system. She owns the distinction of being trained and certified to educate students from primary school to high school under the Montessori standard.

(Counsel's emphasis.) The record contradicts counsel's claim that the petitioner has "more than three (3) years of teaching Mathematics to Middle School students in The petitioner herself claimed only one year of middle school-level teaching in , specifically 8th grade mathematics at during the 2008-2009 school year. In later years, the petitioner taught at From 2009 to 2011, the petitioner taught "upper elementary" students aged nine to twelve; in 2011, she began teaching "primary" students between the ages of three and six. Prior to her arrival in the United States, by her own narrative, the petitioner taught at a "high school" from 2003 to 2008, and before that, at an "elementary school" from 1995 to 2003.

The petitioner stated that originally hired her to teach middle school mathematics, but "budget issues" led to her transfer to Given the petitioner's removal from a middle school position, it is not evident that has either the intention or ability to employ the petitioner as a middle school mathematics teacher.

Regarding the petitioner's Montessori training, the record shows that has a number of Montessori schools (including . Presumably, training in the Montessori method would be a minimum requirement to teach at such a school, in which case the petitioner could articulate such a requirement on a labor certification. The petitioner claims neither experience teaching middle school-level mathematics at a Montessori school, nor Montessori certification to teach at a middle school level; her only claimed Montessori certification is at the elementary level.

The petitioner stated that her initial evidence show that she meets "the expectations for the National Interest Waiver." The petitioner organized the exhibits into categories matching the regulations at 8 C.F.R. § 204.5(m)(3)(ii). An alien who meets the requirements listed there may qualify for classification as an alien of exceptional ability, but the structure of the statute makes it clear that exceptional ability is not sufficient grounds for the national interest waiver. Rather, section 203(b)(2)(A) of the Act specifically applies the job offer requirement to aliens of exceptional ability.

One aspect of the exceptional ability regulations merits further discussion. The regulation at 8 C.F.R. § 204.5(m)(3)(ii)(F) states that one can support a claim of exceptional ability with "evidence of recognition for achievements and significant contributions to the industry or field by peers, governmental entities, or professional or business organizations." Counsel stated that the petitioner received "some awards and recognitions . . . honoring her significant contributions." The exhibits in the "Recognitions/Achievements" section of the record are as follows:

- A letter from awarding the petitioner "a free trip to Bangkok" in recognition of "ten years of service." Length of service is not, itself, a contribution that warrants a national interest waiver. Rather, it is another factor in an exceptional ability claim (see 8 C.F.R. § 204.5(m)(3)(ii)(A)).
- Two "certificates of appreciation" from appear to acknowledge little more than the petitioner's participation as a teacher during the 2008-2009 school year.
- Four certificates from the acknowledged the petitioner's performance as a student there in the early 1990s.

None of the submitted certificates identified any specific contributions to the field of education.

The petitioner submitted several letters from teachers and administrators who have worked with the petitioner, as well as parents of her students. The witnesses praised the petitioner's work in varying levels of detail, but none of them indicated that the petitioner's past work has had a significant impact beyond the schools where she has taught.

president of the Parent-Teacher-Student Association, stated: "I understand that the failed to follow proper protocol as it relates to recruiting under the temporary worker visa program. But forcing invaluable teachers like [the petitioner] to leave because of the school's failure to follow protocol only hurts our children." letter referred to administrative sanctions against USCIS invoked the debarment provisions of section 212(n)(2)(C)(i) of the Act against owing to certain immigration violations by that employer. As a result, between March 16, 2012 to March 15, 2014, USCIS will not approve any employment-based immigrant or nonimmigrant petitions filed by This debarment means that is, temporarily, unable to file its own petition on the alien's behalf, and thus explains why labor certification is not an option in the short term. The inapplicability or unavailability of a labor certification cannot be viewed as sufficient cause for a national interest waiver; the petitioner still must demonstrate that the alien will serve the national interest to a substantially greater degree than do others in the same field. *NYSDOT*, 22 I&N Dec. at 218 n.5.

Neither the Texas Service Center nor the AAO is responsible for the debarment, and those entities have no authority to override or modify it. The national interest waiver is not a "back door" for aliens to avoid legal sanctions imposed on their intending employers. With respect to this particular alien's ability to work in the United States, the AAO notes that a private school, the in , Maryland, filed a nonimmigrant petition on the alien's behalf on August 8, 2012. The Director, Western Service Center, approved that petition. The alien, therefore, holds H-1B nonimmigrant status allowing her to work for the School until July 29, 2014, by which point the debarment order against will have expired.

[1] The list of debarred employers is available online at http://www.dol.gov/whd/immigration/H1BDebarment.htm (printout added to record January 23, 2013).

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Several witnesses, including [redacted] principal of [redacted] School, asserted that it is difficult to locate qualified Montessori teachers. The labor certification process exists to address worker shortages, and therefore the petitioner cannot bypass that process by claiming such a shortage. *See NYSDOT*, 22 I&N Dec. 218.

A section of the petitioner's initial submission falls under the heading "significant contributions to education." The exhibits submitted under this heading included lesson plans, special projects, reading logs, and information about her involvement in community organizations such as a local church. The petitioner cannot simply catalog her activities and deem them "significant contributions to education." She must, rather, demonstrate their significance. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)). The petitioner's subjective opinion of her own work cannot suffice in this regard.

The director issued a request for evidence on May 19, 2012, instructing the petitioner to demonstrate that her "past record justifies projections of a future benefit to the nation." In response to the notice, the petitioner submitted background materials about the need to improve education in mathematics and science. These materials demonstrate the substantial intrinsic merit of math and science education, but not that the benefit from one teacher's efforts is national in scope. Counsel pointed to federal legislation and other national-level efforts relating to education, but local work in pursuit of a national goal does not necessarily yield a benefit that is, itself, national in scope. Counsel did not explain how the petitioner's work would, by itself (rather than as one small part of a much larger effort) benefit the United States as a whole, nor did counsel identify any prior achievement by the petitioner that yielded national benefits. The collective, abstract benefits of education do not imply that the petitioner, as a teacher, presumptively qualifies for the waiver.

Counsel contends that federal policy, as a whole, places a high value on "highly qualified teachers" which an overly strict adherence to *NYSDOT* would thwart. None of the programs or legislation identified (such as the No Child Left Behind Act) created a blanket waiver for teachers; *NYSDOT* remains binding precedent. The AAO notes that Congress has the power to create blanket waivers, and in fact did so in direct response to *NYSDOT* when it enacted section 203(b)(2)(B)(ii) of the Act (which applies to certain physicians). Counsel attributed the lack of a similar provision for teachers to bureaucratic "paralysis" at the highest levels of government, but it remains that counsel cited no statute, regulation or case law to support counsel's position.

Counsel stated that the petitioner's experience and her "passion" make her more qualified than United States teachers, and therefore the labor certification process would pose the risk of harming students by exposing them to less qualified teachers. Counsel then claims that it would take "more than a century until U.S. workers become as highly qualified as" the petitioner, who has "more than 12 years of experience." The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983);

Matter of Ramirez-Sanchez, 17 I&N Dec. 503, 506 (BIA 1980). The director requested evidence to show that the petitioner has a record of accomplishment and impact that would justify the waiver; it cannot suffice for counsel to claim that the petitioner has accumulated such a record, or to assert that United States teachers would jeopardize the education of American students.

After claiming that United States teachers are "more than a century" behind the petitioner's level of expertise, counsel contradicted that claim by stating that it is impossible to compare the petitioner to other teachers:

> [T]he **Inherent Right to Privacy by 'Available U.S. Workers**['] impedes [the petitioner] from squarely complying with the mandate of [*NYSDOT*]. This prevents the self-petitioner from obtaining information of his [*sic*] colleagues regarding their credentials to determine what contribution they have accomplished for purposes of comparing whether her contributions are greater than those 'Available U.S. Workers.['] Hence, even if the burden of proof is on the petitioner, there is no obligation to do so since the supreme law of the land protects every citizen's right to privacy and thus accordingly restricts her from obtaining same.

(Counsel's emphasis.) Because counsel's argument applies to "every citizen," the above assertions force the conclusion that *NYSDOT* is inherently unworkable in every situation. Clearly this is not the case; counsel cites no judicial finding that overturned or limited *NYSDOT* based on privacy concerns (or for any other reason). Counsel's contention rests on the false assumption that the *NYSDOT* guidelines amount to little more than an item-by-item comparison of an alien's credentials with those of qualified United States workers. The key provision, however, which has not been established here, is the petitioner's influence on the field as a whole. To do so does not require an invasive review of other teachers' credentials.

On September 6, 2012, the director denied the petition, stating that the petitioner had not established a past record of achievement and influence that would justify the special benefit of the national interest waiver. The director acknowledged the petitioner's submission of "letters of recommendation from her former principals and colleagues," but found that these letters contained general praise rather than information about any specific past achievements.

On appeal, counsel states: "the reasoning behind the denial . . . is a complete departure from the parameters elicited in the New York Department of Transportation case." Specifically, counsel states: "the Immigration Service is requiring more from the beneficiary's credentials and tantamount to having exceptional ability," even though one need not qualify as an alien of exceptional ability in order to receive the waiver. The director, however, did not require the petitioner to establish exceptional ability in her field. As noted earlier in this decision, it has always been USCIS's position that aliens of exceptional ability present "prospective national benefit," but nevertheless remain subject to the job offer requirement. Therefore, as observed in *NYSDOT*, citing the *Federal Register*, aliens seeking the additional benefit of the waiver must present even more of a "prospective national benefit" than those who merely claim exceptional ability without the waiver.

No statute, regulation or case law establishes a lower standard for members of the professions holding advanced degrees (or, as in this petitioner's case, post-baccalaureate experience equivalent to such a degree).

Citing various government efforts to improve education, counsel states:

> [T]he issue of whether the beneficiary's proposed employment as 'Highly Qualified Mathematics Teacher' traverses the restrictive confines of physical and geographical limitation that normally applies to areas such as Bridge Engineer, Marine Scientist and the like.
>
> Here, the most tangible national benefit to be derived from a 'Highly Qualified Mathematics Teacher' is recreating a society of responsible and values-driven citizens including a highly productive and well-balanced work force that would translate the current recession adversely affecting the United States of America into a formidable economy again including national security.
>
> Hence . . . , the benefits that would be conferred [from the petitioner's work] spreads [*sic*] to the entire nation's economy and security.

Counsel fails to explain how the actions of one mathematics teacher would contribute significantly to nationwide social reform and economic recovery. As noted previously, the unsupported assertions of counsel do not constitute evidence. General assertions about the overall importance of education, and the need for education reform, do not exempt every teacher from the job offer requirement. As members of the professions (as defined in section 101(a)(32) of the Act), teachers are subject to the job offer/labor certification requirement set forth in sections 203(b)(2)(A) and (3)(C) of the Act. Likewise, aliens of exceptional ability who "will substantially benefit prospectively . . . the United States" are also subject to the job offer provision of section 203(b)(2)(A) of the Act. Congress created no blanket waiver for math teachers. It is clear from the statute, therefore, that an alien who works in a beneficial profession such as teaching mathematics is not automatically or presumptively exempt from the job offer requirement.

Apart from describing the petitioner as a "Highly Qualified Teacher" (counsel's capitalization) and stating that such teachers, as a group, should be exempt from the job offer/labor certification requirement, counsel fails to distinguish the petitioner from other qualified professionals in her field. Having first asserted that the director strayed from the guidelines of *NYSDOT*, counsel then alternatively contests those same guidelines, stating: "Exclusively and strictly enforcing the rudiments behind the New York State Department of Transportation Case to Highly Qualified Teachers is unjust, unreasonable and damaging to the 'Best Interest' of the American School Children." Precedent decisions are binding on all USCIS employees in the administration of the Act. *See* 8 C.F.R. § 103.3(c). Counsel cites no statute, regulation or case law that would require or permit USCIS to disregard *NYSDOT* as it applies to school teachers.

As is clear from a plain reading of the statute, it was not the intent of Congress that every person qualified to engage in a profession in the United States should be exempt from the requirement of a job offer based on national interest. Likewise, it does not appear to have been the intent of Congress to grant national interest waivers on the basis of the overall importance of a given profession, rather than on the merits of the individual alien. On the basis of the evidence submitted, the petitioner has not established that a waiver of the requirement of an approved labor certification will be in the national interest of the United States.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed.